(13)

No. 96-1829

In The

Supreme Court of the United States

October Term, 1997

STATE OF MONTANA; MARY BRYSON;
BIG HORN COUNTY; and MARTHA FLETCHER,

Petitioners,

v.

THE CROW TRIBE OF INDIANS and
UNITED STATES OF AMERICA,

Respondents.

On Writ Of Certiorari To The United States
Court Of Appeals For The Ninth Circuit

BRIEF FOR RESPONDENT CROW TRIBE

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QUESTION PRESENTED

Whether a federal court, exercising its remedial powers to correct invasions of federally secured rights, may order a state and county to pay the United States as trustee on behalf of the Crow Tribe production taxes that were illegally imposed on the Tribe's coal and collected from the Tribe's lessee when that remedy corrects the wrongs done to the Tribe and effectuates the purposes of the federal laws that were violated.

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OPINIONS BELOW AND JURISDICTION

The Crow Tribe adopts the Opinions Below and Jurisdiction portions of the Petitioners' Brief (at 1-2).

In this brief, the appellate opinions in the instant case, *Crow Tribe v. Montana*, will be referenced as follows: *Crow I* (650 F.2d 1104 (1981), *amended*, 665 F.2d 1390 (1982), *cert. denied*, 459 U.S. 916 (1982), Pet. App. 169, 167); *Crow II* (819 F.2d 895 (1987), *summarily affirmed*, 484 U.S. 997 (1988), Pet. App. 88, 87); *Crow III* (969 F.2d 848 (1992), Pet. App. 58); and *Crow IV* (92 F.3d 826 (1996), *amended*, 98 F.3d 1194 (1996), Pet. App. 1, 15).

STATUTES INVOLVED

This matter presents a question involving the remedial power of federal courts to correct invasions of federally secured rights. In *Crow II*, the Crow Tribe's federally protected sovereignty as well as its rights under the Indian Mineral Leasing Act of 1938, as amended, 25 U.S.C. §§ 396a-396g, Pet App. 230-33[1], were held to be violated by the application of Montana's severance and gross taxes, 1975 Mont. Laws Chapt. 525, Pet. App. 234-42, to the Tribe's coal.

STATEMENT OF THE CASE

In 1988, this Court summarily affirmed the decision of the Court of Appeals for the Ninth Circuit holding Montana's severance and gross proceeds taxes on Crow

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[1] The Indian Mineral Leasing Act of 1938 was amended by the Act of September 16, 1959, 73 Stat. 567, and the Act of May 17, 1968, 82 Stat. 123, to remove the exception for the Crow Indian Reservation originally included in section 6 of the 1938 Act, 25 U.S C. § 396f. *See* Pet. App. 181-82 n.6.

coal invalid. *Montana v. Crow Tribe of Indians*, 484 U.S. 997 (1988), Pet. App. 87, affirming *Crow Tribe of Indians v. Montana*, 819 F.2d 895 (1987), Pet. App. 88.[2] The court of appeals held that the exorbitantly high state taxes violated the rights of the Crow Tribe under the 1938 Indian Minerals Leasing Act and interfered with the Tribe's federally protected sovereignty. Moreover, it found that Montana had intentionally and illegitimately levied its coal taxes to appropriate most of the economic benefit from tribal coal, *Crow IV*, 92 F.3d at 829, Pet. App. 10; *Crow II*, 819 F.2d at 902, Pet. App. 104-05; *Crow I*, 650 F.2d at 1113, Pet App. 185, and that the taxes "[took] revenue that would otherwise go towards supporting the Tribe and its programs," *Crow II*, 819 F.2d at 902, Pet. App. 107, and "limit[ed] the Tribe's ability to regulate the development of its coal resources," *Crow II*, 819 F.2d at 902-903, Pet. App. 107.

The issue presented in this case is not the validity of the tax but whether the State and County should be allowed to retain the taxes they collected in violation of the Crow Tribe's federally secured rights and at the Tribe's expense, or, as held by the court below, the State and County may be required to pay that money to the United States in trust for the Crow Tribe. The specific question presented in the petition for certiorari is whether that disgorgement remedy in favor of the Tribe is barred because the illegal taxes were paid by the Tribe's lessee, Westmoreland Resources, not by the Tribe.

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[2] This Court's summary affirmance subsequently was reaffirmed in *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 186 and n.17 (1989).

A. Factual Background

In 1974, the Crow Tribe ("Tribe") renegotiated a 1972 coal lease with Westmoreland Resources (Westmoreland). Both the original and renegotiated leases were made pursuant to the Mineral Leasing Act of 1938, 25 U.S. §§ 396a *et seq.*, and were approved by the Secretary of the Interior. Production began in late 1974. Pet. App. 30.[3]

In April 1975, Montana enacted statutes imposing severance and gross proceeds taxes on all coal produced within the State with no exceptions for Indian coal. Pet. App. 234, Mont. Code Ann. §§ 15-35-101 to 111, 15-23-701 to 704. The rate of the severance tax charged on Crow coal produced during the 1975-1982 period at issue in this case was 30% of the value of the contract sales price of the coal, Pet. App. 25, and the gross proceeds taxes added another 5%, Pet. App. 25-26. The effective rate of the combined taxes exceeded 32.9% of the coal's contract sales price after taking allowable deductions and adjustments into account, "more than twice that of any other state's coal taxes." *Crow II*, 819 F.2d at 899 n.2, Pet. App. 98; *Cotton Petroleum*, 490 U.S. at 186 n.17.

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[3] The lease was on tribal coal in an area known as the "ceded strip", just north of the northern surface boundary of the Reservation. Most of the coal and some of the surface of this area, once ceded, had been restored to the Tribe and returned to reservation status by the Act of May 19, 1958, 72 Stat. 121, which provided that:

> Title to the lands restored to tribal ownership by this Act shall be held by the United States in trust for the respective tribe or tribes, and such lands are hereby added to and made part of the existing reservations for such tribe or tribes.

Tribal representatives appeared before the Montana legislature during its consideration of the proposed new coal taxes and strongly opposed their imposition on Indian owned coal on the grounds that:

> (1) they are so out of line with taxes imposed by other neighboring states that Crow coal will no longer be competitive and therefore our coal development program will suffer, and (2) . . . the taxes bear no relation to the responsibilities and burdens which coal development has imposed on the State of Montana . . . [and 3] . . . this level of taxation is so high that [it] becomes an unauthorized state interference with federally secured Indian property.

J.A. 53, 56-57. The Tribe proposed a compromise to the legislature under which coal producers would receive a credit against state taxes for coal taxes paid to Indian tribes. The Montana Senate Taxation Committee rejected the Tribe's proposal, commenting that "there would have to be court decreed settlements regarding Indian coal revenues." J.A. 59. *See Crow IV*, 92 F.3d at 829, Pet. App. 9; Pet. App. 23.

In enacting its coal taxes, the Montana legislature found that strip-mined coal is in sufficient demand that "[a]t least one-third (1/3) of the price it commands at the mine may go to economic rents of royalties and production taxes. . . . " Pet. App. 235, Mont. Code Ann. § 15-35-101(1)(e). In *Crow I*, 650 F.2d at 1113, Pet. App. 185, the court of appeals quoted this legislative finding and concluded "that [b]y setting the severance tax rate at 30 percent of value, Montana made plain its intention to

appropriate most of the economic rent."[4] *See also, Crow II*, 819 F.2d at 902, Pet. App. 104-05; *Crow IV*, 92 F.3d at 829, Pet. App. 10 ("we had . . . found [in *Crow I* that] the coal taxes were intentionally and illegitimately levied to appropriate most of the economic rent from Tribal coal on the ceded strip").

The Tribe enacted its own 25% severance tax in early 1976. J.A. 79. The tribal tax was approved by the Interior Department for coal beneath the surface boundaries of the Reservation but purportedly not as to the Tribe's coal in the ceded strip. Interior's decision not to approve the Tribe's tax as applied to its ceded strip coal was based on its belief at that time that that coal could not be taxed under the Tribal Constitution because it was not part of the Crow Reservation. Pet. App. 19, 31; *Crow I*, 650 F.2d at 1107-08 & 1115 n.19, Pet. App. 172, 192; *Crow II*, 819 F.2d at 897, Pet. App. 93.

It was subsequently determined in *Crow II* that the Tribe's minerals within the ceded strip are part of the Crow Reservation. 819 F.2d at 896-98, Pet. App. 91-95; *supra* at 3 n.3. The United States acknowledged, and the district court found, that the Interior Department's purported disapproval of the Tribe's tax as applied to its ceded strip coal was mistaken and without effect. Pet. App. 36; J.A. 286; U.S. Sup. Ct. Br. in Opposition at 4, 21 n.11; U.S. Ninth Cir. Br. at 19-21; U.S. Ninth Cir. Reply Br. at 6; Pet. App. 31, 36, 69, 78. As the district court explained, the Department's approval of the tax as applied to coal produced within the Reservation "was

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[4] " 'Economic rent' is the amount of revenue that can be extracted from an activity, here in the form of royalties and taxes, without significantly discouraging production." *Crow I*, 650 F.2d at 1113 n.12, Pet. App. 185.

necessarily an approval of that tax as being applicable to Westmoreland's mining of Crow tribal coal" in the ceded strip, since that coal also was part of the Reservation. J.A. 286. Consequently, "at all relevant times the Tribe had a valid coal mining tax applicable to Westmoreland's mining on the ceded strip." Pet. App. 36; J.A. 286.[5]

Westmoreland began paying Montana's new coal taxes in 1975. It paid $46.8 million to the State between 1975 and 1983 and $11.4 million to the County between 1976 and 1986. Pet. App. 23-27.[6] The taxes paid to the State and County were not protested and Westmoreland did not initiate proceedings to recover refunds. Westmoreland later entered into an agreement waiving any claim to a refund. Pet. App. 22, 37.

No coal taxes were paid to the Tribe prior to 1987. Pet. App. 31, 35. During a portion of the period prior to 1982, Westmoreland paid coal taxes of $27 million to the State and $3 million to the County while paying approximately $8 million in royalties to the Tribe. *Crow I*, 650 F.2d at 1107, Pet. App. 172. Thus, the State and County received almost four times more revenue from the Tribe's coal than the Tribe.[7]

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[5] There is no claim or evidence that Montana or Big Horn County ever detrimentally relied on either Interior's purported disapproval of the Tribe's 1976 tax as applied to the tribal coal mined by Westmoreland or on the Tribe's subsequent, unsuccessful efforts to amend its Constitution.

[6] Westmoreland began paying the severance taxes into the district court's registry in 1983 but the gross proceeds taxes were paid to Big Horn County until the *Crow II* decision in 1987. *See infra* at 7, 11-12 & n.9.

[7] The actual disparity was greater because these figures and percentages do not take account of the property, income and resource indemnity taxes Westmoreland paid to Montana and Big Horn County that were not challenged by the Tribe or the United States. *See infra* at 8-9 & n.8.

The Tribe initiated discussions with Westmoreland in 1976 seeking payments in addition to the royalties required under the 1974 amended lease. Westmoreland's position was that "any additional payment to the Tribe would have to be in lieu of, rather than in addition to, the state tax." J.A. 87; *Crow IV*, 92 F.3d at 830, Pet. App. 12. Westmoreland was willing to pay one tax or the other, but not both, and it did not matter to Westmoreland which jurisdiction received those payments. J.A. 397. Westmoreland's president testified that having to pay double taxes would have resulted in the closure of the mine which would have been devastating both to Westmoreland and to the Tribe. J.A. 87, 391-94, 400.

In 1982, the Tribe and Westmoreland agreed on a tax amendment to their lease. Under that amendment, which was approved by the Interior Department, Westmoreland agreed to pay the Tribe taxes equal to Montana's severance and gross proceeds taxes, and the Tribe agreed to give Westmoreland a credit for severance and gross proceeds taxes paid to Montana and Big Horn County. In January 1983, the district court issued a preliminary injunction against collection of the state severance tax and allowed Westmoreland to deposit its severance tax payments into an escrow account managed by the court. The same relief was granted as to the gross proceeds tax in November 1987. Pet. App. 31-32, 35.

Approximately $24 million was deposited into the court's escrow account between 1983 and 1987. In 1988, following this Court's summary affirmance in *Crow II* and further district court proceedings described *infra* at 14-15, the district court issued a final judgment distributing the

funds held in escrow, including accrued interest, to the United States in trust for the Tribe. J.A. 292. There was no appeal from that judgment. Since 1988, Westmoreland has paid all severance and gross proceeds taxes on Crow coal directly to the United States in trust for the Tribe pursuant to the 1982 tax amendment. Pet. App. 36. This case concerns only the money illegally collected by Montana and the County before the taxes were paid into escrow.

Neither Montana nor Big Horn County set aside the contested taxes until the district court required that they be paid into its registry. *Crow IV*, 92 F.3d at 829 n.3; Pet. App. 9. But significant portions of all coal severance revenues received by Montana were deposited into the Constitutional Trust Fund established under Article IX, Section 5 of the Montana Constitution. The principal of that Fund may be spent only with the approval of ¾ of the Montana legislature. *Crow I*, 650 F.2d at 1108, Pet. App. 173; Pet. App. 25. The value of the Fund was more than $500 million as of June 1993, Pet. App. 25, and has since grown to approximately $600 million.

Montana's coal severance tax has generated "enormous revenues," paid principally by out-of-state utility customers. *Cotton Petroleum*, 490 U.S. at 186 n.17 (citing *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 641-42 (1981) (Blackmun, J., dissenting)). From 1975 through 1993, Montana received more than $1.1 billion in coal severance taxes. As of the end of 1993, the value of those revenues (with interest based on the rate of return earned by Montana's Constitutional Trust Fund) exceeded $3.8 billion.

Montana and Big Horn County also derive significant revenues from the Westmoreland mine from sources other than the illegal severance and gross proceeds taxes on Crow coal. These revenues include property, income and

resource indemnity taxes which were not challenged by the Tribe or the United States. Uncontroverted evidence showed that these other sources generated far more income for Montana and Big Horn County than those entities expended for services related or attributable to the Westmoreland mine. *Crow IV*, 92 F.3d at 829-30, Pet. App. 11.[8]

B. Proceedings Here and Below

1. *Crow I.* In 1978, the Tribe filed suit challenging the validity of the state severance and gross proceeds taxes on Crow coal on the ground that they were preempted by federal law. Pet. App. 19; J.A. 90. A year later, the district court dismissed the complaint for failure to state a claim. Pet. App. 197, 469 F. Supp. 154. On appeal, the court of appeals reversed and remanded. *Crow I*, 650 F.2d 1104, 665 F.2d 1390, Pet. App. 167, 169. The court of appeals held that the Tribe had alleged facts which, if proved, would establish that the challenged state taxes were preempted by the Indian Mineral Leasing Act of 1938, 25 U.S.C. §§ 396a *et seq.*, and infringed on the Tribe's right to govern itself. 650 F.2d at 1113-17, Pet. App. 185-96. This Court denied certiorari. 459 U.S. 916 (1982).

In its *Crow I* opinion, the court of appeals applied the principles of preemption of state law in the Indian context as discussed in *White Mountain Apache Tribe v.*

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[8] The expert witness for the Tribe and the United States testified that from 1976 to 1986 Montana and Big Horn County received approximately $29 million in revenues from the Westmoreland mine from sources other than their invalid severance and gross proceeds taxes while the governmental costs associated with the mine during the same period were no more than $5 million. J.A. 297-98, 302a, 313-16, 320, 343.

Bracker, 448 U.S. 136 (1980). Those principles were summarized as follows:

> The [Supreme] Court found that Congress intended broad preemptive effect to be accorded federal statutes and regulations when the state action in question threatens the "firm federal policy of promoting tribal self-sufficiency and economic development". . . . No express congressional statement of preemptive intent is required; it is enough that the state law conflicts with the purpose or operation of a federal statute, regulation or policy. On the other hand, legitimate interests of the state must be considered, and the ultimate result where the conduct of non-Indians on the reservation is involved depends on "a particularized inquiry into the nature of the State, Federal and tribal interests at stake, an inquiry designed to determine whether, in the specific context, the exercise of state authority would violate federal law."

650 F.2d at 1109, Pet. App. 176-77, citations and footnote omitted, *quoting White Mountain*, 448 U.S. at 140 and 149.

The court of appeals concluded that the Indian Mineral Leasing Act of 1938 had three goals: achieving uniformity in the law governing mineral leases on Indian lands; granting tribal governments control over decisions relating to their minerals and over lease conditions; and encouraging tribal economic development. 650 F.2d at 1112-13, Pet. App. 183-85. Montana's severance tax would conflict with two of those purposes if the allegations of the complaint were established. "Most prominently, the magnitude of the tax will prevent the Tribe from receiving a large portion of the economic benefits of its coal." 650 F.2d at 1113, Pet. App. 185. In this regard, the court held that the severance tax statute on its face "made plain

[Montana's] intention to appropriate most of the economic rent." *Ibid*. *See*, discussion *supra* at 3 & 4-5. "While the state may have an interest in perpetuating the value of mineral wealth subject to its general civil jurisdiction, it has no such legitimate interest in appropriating Indian mineral wealth." 650 F.2d at 1114, Pet. App. 187. In addition, the severance tax "conflicts with the . . . Act's purpose of allowing tribes to control the development of their mineral resources." "[T]he [Tribe's] coal is not the State's to regulate, and assertion of such authority diminishes the Tribe's own power to regulate." 650 F.2d at 1114, Pet. App. 188.

2. *Crow II*. Following remand and the adoption and approval of the 1982 tax amendment to the Crow/Westmoreland lease, the Tribe and Westmoreland moved to deposit the disputed severance taxes into the district court's registry and the Tribe moved for a preliminary injunction to prevent Montana from enforcing its tax as long as that money was deposited with the court. Both motions were opposed by Montana. J.A. 161-200. Among other things Montana argued that: (i) the Tax Injunction Act, 28 U.S.C. § 1341, barred the district court from enjoining the state's tax, J.A. 165-69; (ii) the tax is paid by Westmoreland, not the Tribe, so the Tribe lacked any "monetary stake or litigious/interest," J.A. 171-72; (iii) the Tribe also lacked standing and has not proven any direct injury because it is not the taxpayer, J.A. 175-79; (iv) the State would be irreparably injured by the issuance of a preliminary injunction, J.A. 191-92, 199-200; and (v) "it is unnecessary to order the escrow of any funds paid by Westmoreland to the State because the State is fully capable of meeting any obligations which might ultimately arise as the result of any proper judgment,

order or decree issued by any court with proper jurisdiction and authority as the result of this litigation." J.A. 199. The district court rejected these arguments and granted the motions of the Tribe and Westmoreland. J.A. 211-15. The first payment of severance tax money into the escrow account was made in January 1983.

The United States intervened in June 1983 on behalf of the Tribe to protect the interests of the United States as trustee of the coal upon which Montana's taxes were levied. J.A. 2. Following a trial in January 1984,[9] the district court again ruled that Montana's taxes as applied to the Tribe's coal in the ceded strip were not preempted by federal law. 657 F.Supp. at 584, Pet. App. 110-66.[10] The district court recognized, however, the critical importance to the Tribe of obtaining additional revenues in order to achieve the federal objectives of an effective tribal government and a stronger economic base:

> [T]here are enormous unmet needs on the Crow Indian Reservation for additional revenues to

[9] After the trial but before the district court issued its decision, Westmoreland, the Tribe and the United States moved to allow Westmoreland's gross proceeds tax payments to be deposited into the court's registry and the Tribe and the United States sought a preliminary injunction against enforcement of that tax. Those motions were opposed by the petitioners and were denied by the district court. Pet. App. 225-64. Among other things, the district court held, as argued by the petitioners, Pet. App. 258, that there was no need for the funds to be held in escrow because "Mont. Code Ann. 2-9-316 (1983) sets forth an orderly procedure for political subdivisions of the state to satisfy any lawful final judgment." J.A. 263.

[10] The district court declined to declare the rights of the parties regarding the coal within the surface boundaries of the Crow Reservation. 657 F.Supp. at 589, Pet. App. 150-51.

> fund essential governmental programs and services in the areas of housing, health, employment, land acquisition, law enforcement, welfare and education. . . . Revenues gained from the development of tribally-owned coal reserves through taxation, royalty collection, or by any other legally-sanctioned means, could significantly assist the Tribe in developing a more effective tribal government and a stronger economic base.

657 F.Supp. at 584, Pet. App. 136.[11]

The court of appeals reversed, 819 F.2d 895, Pet. App. 88-109, finding, *inter alia*, that: (i) Montana's coal taxes "forced the coal producers to charge higher prices, reducing the demand for their Montana coal and resulting in fewer sales for the producers and fewer royalties for the Tribe," 819 F.2d at 899, Pet. App. 97; (ii) Montana's coal taxes reduced tribal revenues by impairing the marketability of the Tribe's coal, 819 F.2d at 903, Pet. App. 109; (iii) "tax revenue from coal production could generate funds for tribal services and provide employment for tribal members. . . . By taking revenue that would otherwise go towards supporting the Tribe and its programs, and by limiting the Tribe's ability to regulate the development of its coal resources, the state tax threatens Congress's overriding objective of encouraging tribal self-government and economic development," 819 F.2d at

[11] The expert economist for the Tribe and the United States presented undisputed testimony during the 1994 trial that: (i) the unemployment rate among Crow Indians was 44% compared to 3.3% among non-Indians in Big Horn County and 6% among all non-Indians in Montana; (ii) per capita income of Crow Indians was $4,243 compared to $10,717 for non-Indians in Big Horn County; and (iii) 50% of Crow Indians live under the poverty level as compared to 13% of the non-Indians in Big Horn County. 1 Tr. 136-39 (April 18, 1994).

902-903, Pet. App. 107; and (iv) "Montana's coal taxes . . . interfere with tribal economic development and autonomy," 819 F.2d at 903, Pet. App. 108.

The court of appeals further found that Montana's coal taxes were not narrowly tailored to support legitimate state interests. 819 F.2d at 900-01, Pet. App. 100-03. Accordingly, the challenged taxes were inconsistent with the purposes of, and therefore were preempted by, the Indian Mineral Leasing Act and also unlawfully infringed on the Tribe's sovereignty. 819 F.2d at 902-903, Pet. App. 105-07.

The court of appeals held that the Tribe's coal resources beneath the ceded strip "are a component of the reservation land itself." This conclusion was based on the Act of May 19, 1958, 72 Stat. 121, quoted *supra* at 3 n.3. 819 F.2d at 898, Pet. App. 95. Since the State's taxes were invalid as to the Tribe's coal in the ceded strip, it necessarily followed that they also were unlawful as applied to the coal within the Reservation boundaries. 819 F.2d at 903, Pet. App. 108. This Court summarily affirmed the court of appeals' judgment. 484 U.S. 997 (1988), Pet. App. 87.

Back in the district court following remand, attention initially focused on the escrowed funds. First, Westmoreland's utility customers, who paid the taxes pursuant to their coal purchase agreements with Westmoreland, sought to intervene, claiming that they were entitled to that money. Westmoreland also moved to join the utilities as additional parties. Both motions were denied. Pet. App. 265. Then Westmoreland moved to amend its previous position and to assert a claim to the escrowed funds. The district court granted Westmoreland's motion to amend its answer but denied its requested relief. It found "that the Crow Tribe of Indians, not Westmoreland,

is entitled to the funds held in the Court" because, among other things "[a]t all relevant times, the Crow Tribe has had a valid coal mining tax applicable to the mining by Westmoreland of its coal even though Westmoreland's mining activities were conducted on the ceded strip." Pet. App. 286. Neither Montana nor Big Horn County made any claim to the escrowed funds or took any position regarding their disposition.

Shortly thereafter, the district court issued a final judgment awarding the escrowed funds (approximately $29 million) to the United States in trust for the Tribe. Pet. App. 288, 292. This judgment was not appealed.

3. *Cotton Petroleum.* Fifteen months after its summary affirmance of *Crow II*, this Court upheld the validity of New Mexico's severance taxes as applied to tribally owned oil and gas produced by a tribal lessee in *Cotton Petroleum*. In its *Cotton* opinion, this Court distinguished New Mexico's taxes from those at issue in *Crow II*. Montana's "unique" severance and gross proceeds taxes, unlike New Mexico's, were "extraordinarily high" and "imposed a substantial burden on the Tribe." They also "had a negative effect on the marketability of coal produced in Montana." 490 U.S. at 186 & n.17. Accordingly, there was no need for this Court to reexamine its summary affirmance of *Crow II*. *Ibid.*

4. *Crow III.* *Crow III* concerned the claim of the United States and the Tribe to the severance and gross proceeds taxes illegally collected on Crow coal before Westmoreland began paying the disputed money into the district court's escrow account.[12] The district court

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[12] This money was not at issue when *Crow I* was briefed and decided. Consequently, that court's observation (650 F.2d 1113 n.13, Pet. App. 186 (emphasis added)) that the Tribe "is

denied the motion of Montana and Big Horn County to dismiss those claims. Pet. App. 67-86. Citing the Montana Supreme Court's decision in *Valley County v. Thomas*, 97 P.2d 345 (1939), as well as cases from other jurisdictions, cited *infra* at 45 n.31, the district court held that "an action for restitution may be maintained by one governmental entity against another even though the plaintiff is not the source of the funds." Pet. App. 80.

The court of appeals initially accepted an interlocutory appeal to determine whether the United States and the Tribe could state a claim to funds illegally collected from the Tribe's lessee. *Crow III*, 969 F.2d at 848, Pet. App. 59. Following full briefing and oral argument, however, the appeal was dismissed as improvidently granted because that issue essentially had been decided in *Crow II*. *Ibid*.

4. *Crow IV*. After the decision in *Crow III* and another trial, the district court issued its decision in the current phase of this case in November 1994. It determined that "it is a question of fact . . . whether a remedy in restitution arises at all in this case." Pet. App. 46-47. The district court recognized that Montana's illegal coal taxes had significant adverse impacts on the Tribe and contravened Congress' overriding objective of encouraging self-government and economic development. Pet. App. 27-29, 45 and 50. In its view, however, these factors favoring the Tribe were outweighed by others. Pet. App. 31-37, 45-54. Finding that it would not be unjust for Montana and Big Horn County to retain the taxes they illegally imposed and collected on Crow coal, the district

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apparently not entitled to any refund if the tax statutes are declared invalid," was rightly accorded no weight in its subsequent decisions. *See* Pet. App. 77-79.

court ruled that the Tribe and the United States were not entitled to any recovery. Pet. App. 52, 54.

In its conclusion of law, the district court reiterated its previous ruling that the Tribe and the United States were not automatically barred from recovering taxes paid by the Tribe's lessee. Nevertheless, it found that "the lack of privity" between the Tribe and Montana "has its place in determining restitution damages." Pet. App. 48-50.

The court of appeals reversed, stating that the district court:

> [F]ailed to give appropriate weight to the law of this case as established in the three prior appeals. In the process of weighing the equities in favor of and against restitution, the district court in effect reconsidered questions of law already decided by this Court in the prior appeals. Nearly every factor relied upon by the district court to determine that the Tribe was not entitled to relief is either contradicted or made irrelevant by our earlier holdings.

Crow IV, 92 F.3d at 828, Pet. App. 8.

The court of appeals held that the disgorgement remedy in favor of the Tribe was appropriate. It stressed the Tribe's need to raise revenues in order to fulfill the congressional objectives of tribal economic development and self-sufficiency:

> The [district] court improperly minimized the weight to be given the Tribe's interest in raising revenue from its mineral resources. We had stated in *Crow II* that "[c]oal production is vital to the economic development of the Crow Tribe [and] generate[s] funds for essential tribal service[s]," 819 F.2d at 901 [, Pet. App. 103], and noted that the Tribe's interest in coal tax revenue was particularly significant in view of the

> federal interest in Tribal economic development and self-sufficiency. *Id.* at 898 [Pet. App. 95].

92 F.3d at 829, Pet. App. 10.

The court of appeals further concluded that the district court had erred and ignored the law of the case by relying on the identity of the taxpayer. *Crow IV*, 92 F.3d at 828-29, Pet. App. at 8-9. It found that Westmoreland had agreed to pay the tribal tax in the 1982 amendment to the coal lease and that Westmoreland "was willing to pay coal taxes to the Tribe as early as 1976." Consequently, "there was no reason for the [district] court to distinguish between the taxes collected before and after 1982." *Crow IV*, 92 F.3d at 830, Pet. App. 11-12. The court of appeals also rejected Montana's reliance on *United States v. California*, 507 U.S. 746 (1993), because *California* "involved an entirely different factual situation." *Crow IV*, 92 F.3d at 828-29 n.2, Pet. App. 8-9; 93 F.3d at 194-95, Pet. App. 16.

The case was remanded to the district court "for entry of an order directing the State and County to disgorge the improperly collected taxes." *Crow IV*, 92 F.3d at 830, Pet. App. 12.

SUMMARY OF ARGUMENT

The Tribe and the United States unquestionably have causes of action to enforce the Tribe's federally secured rights and sovereign powers by claiming that Montana's taxes on the Tribe's coal resources are preempted by applicable federal law. The sole question presented in the petition for certiorari is whether the relief ordered by the court below to remedy the violation of the Tribe's rights is precluded because the illegal taxes were paid by the Tribe's lessee, not by the Tribe. The answer to that question is found in the rules governing the fashioning of appropriate relief to remedy invasions of federally

secured rights, not in the arguments of the petitioners and their amici directed to the analytically distinct issue of whether the Tribe and the United States have a separate and independent cause of action for recovery of the illegally collected taxes.

The petitioners' reliance on *United States v. California*, 507 U.S. 746 (1993), is misplaced primarily because the issue there was whether the United States, as a subrogee of the taxpayer, had a federal cause of action to recover taxes paid by its contractor and challenged under state law. *California* had nothing to do with the fashioning of appropriate relief for the violation of federally secured rights.

The outcome of the instant appeal is controlled not by *California* but by the principle, which dates back to "the earliest days of the Republic," that "if a right of action exists to enforce a federal right and Congress is silent on the question of remedies, a federal court may order any appropriate relief." *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60, 66, 69 (1992). The disgorgement remedy in favor of the Tribe ordered by the court below is appropriate primarily because: (i) it corrects the wrongs done to the Tribe during the period the petitioners collected their illegal coal taxes from Westmoreland; (ii) it effectuates the purposes of the federal laws violated by the petitioners; and (iii) it promotes compliance with and deters violations of those laws by others. In addition, the disgorgement remedy is supported by the rule that judicial decisions must be given full retroactive effect and by the fundamental and unquestioned principle of equity that no one shall be permitted to take advantage of his own wrong.

The fact that the illegal taxes were paid by Westmoreland is not relevant because the Tribe is the intended beneficiary of the laws that were broken and the party that was directly injured by the petitioners' illegal acts. The

federally secured rights and powers of the Tribe were violated, not those of Westmoreland. In *California*, by contrast, the government's cause of action was predicated solely on its voluntary indemnification agreement with its contractor.

None of the other arguments advanced by the petitioners makes the disgorgement remedy in favor of the Tribe inappropriate. The Tax Injunction Act is not applicable to suits challenging the validity of state taxes brought by the United States or Indian tribes. Remedies for the violation of federally secured rights are not limited by the requirements of common law causes of action. Even if they were so limited, the elements of the common law cause of action of assumpsit for money had and received clearly are satisfied in the circumstances presented here.

ARGUMENT

I. THIS CASE INVOLVES RELIEF FOR A FEDERAL CAUSE OF ACTION PREVIOUSLY HELD TO EXIST, WHILE THE ISSUE IN *CALIFORNIA* WAS WHETHER THERE WAS A FEDERAL CAUSE OF ACTION.

The arguments of petitioners and their supporting amici are marked by failure to distinguish between two analytically distinct issues, whether a litigant has a cause of action and what relief a litigant with a cause of action may be entitled to receive. *See Davis v. Passman*, 442 U.S. 228, 239 (1979), *quoted and followed in Franklin v. Gwinnett County Public Schools*, 503 U.S. 60, 69 (1992).[13] Like the

[13] In a helpful footnote in *Davis*, this Court explained the issues of jurisdiction, standing, cause of action and relief:

> [J]*urisdiction* is a question of whether a federal court has the power, under the Constitution or laws of the United States, to hear a case . . . ; *standing* is a question of whether a plaintiff is sufficiently adversary to a defendant to create an Art. III case or controversy, or at least to overcome prudential limitations on federal-court jurisdiction . . . ; *cause of action* is a question of whether a particular plaintiff is a member of the class of litigants that may, as a matter of law, appropriately invoke the power of the court; and *relief* is a question of the various remedies a Federal Court may make available.

442 U.S. at 239 n.18. *See* 28 U.S.C. § 2202 (federal courts may grant further relief after issuing a declaratory judgment).

instant case, *Franklin* turned on the difference between the existence of a cause of action and determining the appropriate remedy once a violation was found. A student brought suit under Title IX of the Education Amendments of 1972 seeking damages against a federally funded public high school on account of sexual harassment. Holding that damages were an appropriate remedy, this Court reaffirmed that "the question of what remedies are available under a statute that provides a private right of action is 'analytically distinct' from the issue of whether such a right exists in the first place." 503 U.S. at 66-67. *See also, id.* at 69 ("the question whether a litigant has a 'cause of action' is analytically distinct and prior to the question of what relief, if any, a litigant may be entitled to receive").[14] This Court then reaffirmed the

[14] The government's position in *Franklin* was rejected because it "mirrored the very misunderstanding over the difference between a cause of action and the relief afforded under it that sparked the confusion we attempted to clarify in *Davis*." 503 U.S. at 69.

The Tribe acknowledges that it was not always properly mindful of the distinction between a cause of action and the relief granted under it during the 20 year odyssey of this case and that it may have contributed to some of the confusion. At all relevant times, however, the petitioners clearly knew that the

long line of cases holding that "if a right of action exists to enforce a federal right and Congress is silent on the question of remedies, a federal court may order any appropriate relief." *Ibid.*

There is no doubt that the Tribe and the United States have a cause of action to enforce the Tribe's federally secured rights and sovereign powers by claiming that Montana's coal taxes on the Tribe's mineral resources are preempted by applicable federal law. In *Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463, 473-74 & n.13 (1976), this Court reviewed its decisions in *Heckman v. United States*, 224 U.S. 413 (1926), and *United States v. Rickert*, 188 U.S. 432 (1903), and concluded that both the United States and the tribes had the requisite interest to secure the Indians' immunity from state taxation which conflicts with the measures the federal government adopted for their protection.[15] More recently, this Court ruled on challenges by Indian tribes to state taxation and to state license fees without questioning the existence of causes of action. *E.g., Montana v. Blackfeet Tribe*, 471 U.S. 759 (1985); *New Mexico v. Mescalero Apache Tribe*, 462 U.S.

Tribe and the United States were seeking recovery of the illegal taxes collected by the State and County and they were never misled in any material way. *See* F.R. Civ. P. 54(c) quoted *infra* at 24 n.18.

[15] Similarly, *United States v. Minnesota*, 270 U.S. 181, 193-95 (1926), upheld the right of the United States to invoke this Court's original jurisdiction on behalf of Chippewa Indians against a state to cancel patents the government had issued to the state. The interest of the government was found to "arise out of its guardianship over the Indians and out of its right to invoke the aid of a court of equity in removing unlawful obstacles to the fulfillment of its obligations; and in both aspects the interest is one which is vested in it as a sovereign." *Id.* at 194.

324 (1983); and *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980). *See also, National Farmers Union Ins. Co. v. Crow Tribe*, 471 U.S. 845, 850-53 (1985) (recognizing a federal common law cause of action by non-Indian property owners challenging the civil jurisdiction of a tribal court and analogizing that claim to actions brought by Indian tribes to determine the extent of their immunity from state taxation). Moreover, the existence of causes of action by the Tribe and the United States to determine that federal law preempts Montana's coal taxes from being applied to Crow coal is conclusively established between the litigants by the decisions in *Crow I* and *Crow II* and the resulting final judgment issued by the district court in 1988, J.A. 292, which was not appealed. *See also* Pet. App. 75 (the instant proceeding is an extension of the previously established equity jurisdiction over causes of action brought by the Tribe and the United States).

Petitioners principally rely on *United States v. California*, 507 U.S. 746 (1993). The issue there, however, was whether the United States had a *federal cause of action* to recover taxes paid by someone else and challenged *under state law*.[16] *California* did not address the question of *relief* presented here, that is, whether the Tribe and the United

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[16] *See* 507 U.S. at 750 (Government's claim was "posited upon the interpretation of a state-created exemption from a state-created sales tax"); *Id.* at 754. ("[w]e conclude . . . that the Government cannot use the existence of an obligation to indemnify [its contractor] to create a *federal cause of action* for money had and received to recover state taxes paid by [its contractor] . . . ; *Id.* at 759-60 ("[t]oday we hold that shouldering the 'entire economic burden of the levy' . . . through indemnification does not give the Federal Government a *federal common law cause of action* for money had and received to challenge a state tax *on state-law grounds* simply because it is the Government"). (Emphasis added).

States, who indisputably have a cause of action to challenge state taxes on the grounds that they are preempted *by federal law*, are entitled to a remedy in the form of recovery of those taxes where they were found to violate *their* federally secured rights and powers, *not those of the taxpayer*.[17] The relief issue therefore is governed not by *California* but by *Franklin* in which this Court reaffirmed the longstanding principle that where federally secured rights are invaded, federal courts will grant the relief necessary to effectuate the congressional purpose and to make good the wrong done.[18]

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[17] In *California*, unlike the instant case, the United States sued as a subrogee of the taxpayer and thus stood in its shoes. This point is discussed further *infra* at 31-32 and 45-46.

[18] Perhaps mindful of this fatal flaw in their principal argument, petitioners attempt to transform and trivialize the issue presented to this Court to a question of whether the disgorgement remedy was properly pleaded. *See* Pet. Br. 14, 25. This effort is equally unavailing for several reasons including: (i) the pleading issue is neither presented in the petition nor fairly including therein, *see infra* at 39-40; (ii) there is no requirement that plaintiffs specifically plead the form of relief they will seek, F.R.Civ.P. 54(c) ("every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in the party's pleadings"); and *Holt Civic Club v. City of Tuscaloosa*, 439 U.S. 60, 65-66 (1979); and (iii) petitioners clearly had notice of both the nature of the relief sought by the Tribe and the United States and the legal basis for that relief, Pet. App. 253, 259 (Tribe's Fourth Amended Complaint sought restitution and equitable relief for all severance and gross proceeds taxes paid on the production of Crow coal); *Id.* at 74-76 (1990 district court ruling that current phase of this case was an extension of its previously invoked equity jurisdiction and that once violations of significant tribal interests were established, district court had "broad equitable powers" to construct a remedy "that refers to state law but is not defeated by it"); and J.A. 335, 338 (Final Pre-

The Tribe and the United States properly invoked the jurisdiction of the federal courts to determine the extent of the Tribe's immunity from Montana's coal taxes.[19] There are no legitimate issues regarding the existence of their causes of action. The sole question raised in the petition for certiorari is one of *relief*, whether the State and County may be required to pay the money to the United States in trust for the Tribe that they illegally collected from Westmoreland. The proper analytic framework for deciding this issue is stated in *Franklin*: "[I]f a right of action exists to enforce a federal right and Congress is silent on the question of remedies, a federal court may order any appropriate relief." 503 U.S. at 69.

II. THE DISGORGEMENT REMEDY IN FAVOR OF THE CROW TRIBE IS APPROPRIATE.

Montana and Big Horn County violated the rights and interfered with the sovereignty of the Tribe and thwarted Congress's overriding objectives of encouraging tribal self-government and economic development by illegally collecting more than $58 million in taxes on coal

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Trial Order stating positions of Tribe and United States that the petitioners' "violations of federal law give rise to whatever remedies are necessary and appropriate to redress those wrongs, to fulfill the Indian Mineral Leasing act and the Tribe's sovereign rights, to restore the Tribe to the position it would have occupied if the violations had not occurred and to deprive the wrongdoers of any gains from their illegal acts" and that "the causes of action of the Tribe and the United States based on restitution or unjust enrichment are federal claims which may borrow from state law," *citing, inter alia, Franklin*).

[19] The Eleventh Amendment has not been raised before this Court and is not an issue because the United States brought suit on the Tribe's behalf. *Arizona v. California*, 460 U.S. 605, 614 (1983); Pet. App. 42, 72-73.

owned by the United States in trust for the Tribe. *Crow II*; *Cotton Petroleum*. The findings below conclusively establish that: (i) Montana and Big Horn County violated *the Tribe's* federally secured rights and powers, not Westmoreland's, and severely injured the Tribe; (ii) Montana's coal taxes were intentionally and illegitimately levied to appropriate most of the value of the Tribe's mineral wealth; and (iii) Montana and Big Horn County took money that otherwise would have gone towards supporting the Tribe and its programs. *See supra* at 2, 4-5, 10-11, 13-14, 15 and 17-18. The disgorgement remedy in favor of the Tribe ordered by the court of appeals is appropriate primarily because it corrects these wrongs done to the Tribe by effectuating the purposes of the laws that were broken and promotes compliance with, and deters violations of, those laws.

A. The Cardinal Principles Governing Appropriate Relief to Remedy Invasions of Federally Secured Rights Are to Correct the Wrongs Done to the Victim, to Effectuate the Purposes of the Laws Violated by the Wrongdoers, and to Promote Compliance with and Deter Violations of those Laws by Others.

The primary consideration in fashioning appropriate relief to remedy violations of federal law is to make good the wrongs done by effectuating the purposes of the laws that were violated. *Franklin*, 503 U.S. at 66; *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418 (1975); *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375, 385, 386 (1970) (remedies for violation of the Securities Exchange Act of 1934 "are not to be limited to prospective relief" and should "effectuate the congressional policy by resolving doubts in favor of those the statute is designed to protect"); *J.I. Case v. Borak*, 377 U.S. 426, 433 (1964) ("it is the

duty of the courts to be alert to provide such remedies as are necessary to make effective the congressional purpose"); *Mitchell v. DeMario Jewelry*, 361 U.S. 288, 292 and 296 (1960) (although district courts enjoyed "historic power of equity" to award lost wages to victims of unlawful discrimination, "the statutory purposes leave little room for the exercise of discretion not to order reimbursement"); *Bell v. Hood*, 327 U.S. 678, 684 (1946) ("it is also well settled that where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done"); and *Hecht Co. v. Bowles*, 321 U.S. 321, 331 (1944) (the discretion of federal courts in remedying violations of federal law "must be exercised in light of the large objectives of the Act").

Albemarle illustrates application of this overriding principle. A seniority system was found to discriminate against present and former black employees at a paper mill in violation of their civil rights under federal law. The district court refused to award backpay to the plaintiff class for losses suffered under the illegal seniority program for two reasons, lack of bad faith by the employer and substantial prejudice to the employer resulting from plaintiffs' failure to seek backpay until nearly five years after the action was brought.

This Court reversed, holding that the power of the district court must be exercised "in light of the large objectives of the Act." 422 U.S. at 416. This Court stated:

> It is true that "[e]quity eschews mechanical rules . . . [and] depends on flexibility. . . . But when Congress invokes the Chancellor's conscience to further transcendent legislative purposes, what is required is the principled application of standards consistent with those

> purposes and not "equity [which] varies like the Chancellor's foot." Important national goals would be frustrated by a regime of discrimination that "produce[d] different results for breaches of duty in situations that cannot be differentiated in policy." . . . The District Court's decision must therefore be measured against the purposes which inform [the federal law violated by the defendants].

422 U.S. at 417 [bracketed material in original, citations omitted]. This Court then held that the absence of bad faith was not a sufficient reason for denying backpay.

The backpay remedy in *Albemarle* also was found appropriate because it would promote compliance with, and deter violations of, the federal law that was violated. The primary objective of the law at issue was prophylactic, "to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees." 422 U.S. at 417. This Court stated:

> Backpay has an obvious connection with this purpose. If employers faced only the prospect of an injunctive order, they would have little incentive to shun practices of dubious legality. It is the reasonably certain prospect of a backpay award that "provide[s] the spur or catalyst which causes employers and unions to self-examine and to self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges of an unfortunate and ignominious page in this country's history."

422 U.S. at 417-18, citation omitted. *See also, United States v. City of Spokane*, 918 F.2d 84, 89 (9th Cir. 1990), *cert. denied*, 501 U.S. 1250 (1991) ("retroactive operation of our decision [invalidating taxes on a federal instrumentality] will surely foster a proper respect for that principle by

encouraging local entities to tread carefully when they impose taxes on entities like the Red Cross").

In *Franklin*, this Court applied these principles and held that damages are an appropriate remedy to correct violations of sex discrimination under a federal statute. This Court rejected the argument that the permissible remedies should be limited to backpay and prospective relief on the ground that those remedies would not do anything to correct the wrong done to the particular plaintiff. 503 U.S. at 71.

Denying an otherwise appropriate remedy for the invasion of federally secured rights may be justified only if based on an estoppel or on the plaintiff's closely related illegal conduct. *Albemarle*, 422 U.S. at 422-25; Dan B. Dobbs, I *Law of Remedies*, § 2.4(7) at 119 (1993). Here there are no allegations or suggestions of either.

B. The Disgorgement Remedy in Favor of the Tribe Corrects the Wrongs Done to the Tribe, Effectuates the Purposes of the Law Violated by the State and County and Promotes Compliance with and Deters Violations of those Laws.

Under *Franklin*, *Albemarle* and the other decisions of this Court cited above as well as those cited and followed in *Franklin*, whether the disgorgement remedy in favor of the Tribe is appropriate here is governed primarily by the answers to the following related questions: (i) will the remedy correct the wrong done to the Tribe?; (ii) will the remedy effectuate the purposes of the laws violated by the State and County?; and (iii) will the remedy promote compliance with, and deter violations of, the laws that were broken?

Montana's "unique," "extraordinarily high" and illegal coal taxes "imposed a substantial burden on the

Tribe." They "had a negative effect on the marketability of coal produced in Montana," "illegitimately" appropriated 80% of the economic rent attributable to the Tribe's coal and took "revenue that would otherwise go towards supporting the Tribe and its programs." It is therefore conclusively established that the imposition of the state's taxes on the Tribe's coal interfered with Congress's overriding objectives of encouraging tribal self-government and economic development. *Cotton Petroleum*, 490 U.S. at 186 & n.17; *Crow IV*, 92 F.3d at 830, Pet. App. 12; *Crow II*, 819 F.2d at 902-03, Pet. App. 107-08.[20]

If petitioners' position were upheld, the Tribe would be left without any remedy for the wrongs inflicted by Montana and Big Horn County before the court orders providing for the taxes on the Tribe's coal to be paid into the district court's registry. The disgorgement remedy ordered by the court below compensates the Tribe for those injuries. It also effectuates the congressional purposes of the federal laws by encouraging tribal self-government and economic development, just as the award of the escrowed funds in 1988 fulfilled those purposes during the periods the challenged taxes were paid into the district court's registry.

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[20] *See e.g., California v. Cabazon Band*, 480 U.S. 202, 219 (1987) ("self-determination and economic development are not within reach if the Tribes cannot raise revenues and provide employment for their members"); *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 335 (1983) ("Congress' objective of furthering tribal self-government . . . includes Congress' overriding goal of encouraging 'tribal self-sufficiency and economic development' "); *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143 and n.10 (1980) (describing "a number of congressional enactments demonstrating a firm federal policy of promoting tribal self-sufficiency and economic development").

Moreover, if states and their political subdivisions knew that they would be able to keep tax revenues obtained in violation of tribal rights, "they would have little incentive to shun practices of dubious legality." *Albemarle*, 422 U.S. at 417. They would be encouraged to impose taxes of questionable validity on Indian commerce and quickly collect as much money as possible, secure in the knowledge that there would not be a retroactive remedy even if the taxes eventually are found illegal. The possibility of a disgorgement remedy when state taxes arguably infringe on the federally secured rights and powers of Indian tribes would serve as a healthy deterrent and an incentive for state and local officials to tread carefully and cautiously in this sensitive area. Paraphrasing *Albemarle*, it is the prospect of being held liable for their ill-gotten gains that provides the spur that would cause states and their political subdivisions to try to eliminate their activities which infringe on tribal sovereignty and interfere with Congress's overriding objectives of encouraging tribal self-government and economic development. *Id.* at 417-18.

C. The Crow Tribe, not Westmoreland, Is the Intended Beneficiary of the Federal Laws that were Broken and the Party Injured by Their Violation.

The fact that Montana's illegal taxes were collected from Westmoreland makes no difference. Unlike *California*, where the cause of action of the United States was based solely on its status as a subrogee of its contractor under a voluntary indemnification agreement,[21] here the

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[21] *California* involved a typical claim under state law by a taxpayer that certain property should not have been taxed.

Tribe's action and standing are predicated on the violations of its federally secured rights. The Tribe and the United States are not claiming by, through or under Westmoreland. The Tribe, not the taxpayer, is the intended beneficiary of the federal laws that were broken.

The Tribe is the real party in interest which suffered legal injury from the violation of federal laws. The state's coal taxes collected from Westmoreland were held invalid because they appropriated *the Tribe's* mineral wealth and because they left little or no room for *the Tribe* to regulate the development of, and to optimize its revenues from, its coal. Congress did not intend to create tax havens or windfalls for companies mining tribal minerals or to make them subject to lower tax burdens than their competitors. Tribal lessees like Westmoreland simply are the vehicles through which the federal policies of promoting tribal economic development and self-government are achieved.

Moreover, unlike the situation in *California*, the interests of the Tribe and Westmoreland are partially antagonistic. Westmoreland knew that it would have to pay coal taxes either to the State or to the Tribe. Its objective was to avoid having to pay taxes to both jurisdictions. The Tribe, on the other hand, was seeking to maximize its revenues as well as its control over the development and marketing of its minerals. The Tribe also was concerned about a double burden of taxation being imposed on its lessee, for fear that Westmoreland would have to close its mine. *See supra* at 7.

Under the state tax statute, the claimed exemption was a matter entirely between the state and the taxpayer.

Vesting the exclusive right to recover illegally collected state and local taxes in the tribes' mineral lessees would undermine the purposes of the laws that were violated. As shown by the instant case, mineral lessees might find it in their interest not to challenge the validity of state taxes and/or to negotiate agreements waiving their claims to the taxes paid to the states. States would have an incentive to do everything within their power to obtain these kinds of arrangements. The economic interest of the tribal lessees then would be to do everything they could to prevent tribes from imposing their own taxes, *e.g.*, by threatening to close the mine or to delay mining until the state/tribal taxation issues were clarified, or by persuading the Interior Department not to approve the tribal tax because it would not be in a tribe's best interest or because a tribe lacked the power under its Constitutions or under federal law, or for some other reason. In short, there would be a tendency for the tribes' lessees to become the tribes' adversaries. Simply the existence of these factors and complications would be a major deterrent to mining companies even contemplating a mining lease with an Indian tribe, no less making a major investment to extract tribal minerals.

The denial of the disgorgement remedy therefore not only would deprive the Tribe of any remedy for the wrongs inflicted by petitioners during the periods they illegally collected taxes from Westmoreland, it would also undermine the salutary objectives of federal law and create major impediments to a healthy and constructive relationship between tribes and their mineral lessees. An outcome more at odds with the objectives of the laws that were broken or with the overriding purposes of federal Indian law scarcely can be imagined.

D. Other Considerations Support the Disgorgement Remedy.

1. Judicial Decisions Should Be Given Full Retroactive Effect.

Consideration of an appropriate remedy often becomes entangled with whether a decision should be given retroactive effect. *See Mills*, 396 U.S. at 386; *J.I. Case*, 377 U.S. at 434; and *McKesson Corp. v. Division of Alcoholic Beverages and Tobacco*, 496 U.S. 18, 31 (1990). In *Harper v. Virginia Department of Taxation*, 509 U.S. 86 (1993), which also involved the recovery of illegal state taxes, this Court overruled the test for prospective application of judicial decisions applied in *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971), and "prohibited the erection of selective temporal barriers to the application of federal law in noncriminal cases." 509 U.S. at 97. Federal courts lack power to make rules of law retroactive or prospective as they see fit. 509 U.S. at 95 & n.9 and 96. Rather,

> [w]hen this Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate our announcement of the rule.

509 U.S. at 97. *See also, Rivers v. Roadway Express*, 511 U.S. 298, 312 (1994). Under *Harper*, the holding of *Crow II* should be applied to all preceding events including the collection of the illegal taxes prior to the establishment of the district court's escrow account.

The petitioners seek to erect precisely the sort of artificial temporal barrier that *Harper* expressly prohibits. In the final analysis, the petitioners' position depends on one factor – whether and when the illegal taxes were paid into the district court's registry. If so, they would be

turned over to the United States in trust for the Tribe; if not, Montana and Big Horn County would get to keep tens of millions of dollars they collected illegally at the Tribe's expense.[22] *Harper's* full retroactivity rule does not allow the ultimate outcome of a case to turn on such time-related, fortuitous events or on interlocutory decisions based on the probability of ultimate success on the merits prior to development of a factual record and appellate review. *See Crow IV*, 92 F.3d at 830, Pet. App. 12 ("there was no reason for the [district] court to distinguish between the taxes collected before and after 1982").

2. The Principles of Finality and Repose Should be Respected.

The *Crow II* decision and its aftermath resulting in the 1988 unappealed final judgment awarding the escrowed money to the United States in trust for the Tribe establish the appropriateness of the Tribe receiving all severance and gross proceeds taxes paid by Westmoreland on its coal as the retroactive remedy for the violations of its rights and sovereignty. That determination "should be subject to the general principles of finality and repose, absent changed circumstances or unforeseen issues not previously litigated." *Arizona v. California*, 460 U.S. at

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[22] There was no indication that the district court's decisions in 1983 and '84 whether to require the taxes to be paid into escrow later would become the controlling factor in determining the extent of appropriate final relief. To the contrary, in 1984 the district court saw no need to order Westmoreland's gross proceeds tax payments to be paid into escrow because it reasoned that the Tribe would have an adequate remedy under Mont. Code Ann. § 2-9-316 if that tax eventually was declared invalid. J.A. 260, 262-63; *supra* at 12 n.9.

619.[23] Those principles preclude according different treatment to the illegal taxes collected before and after the escrow accounts established by the district court.

3. Federal Interests Take Precedence Over a State's Interest In Retaining Taxes Collected in Violation of Federal Law.

In *McKesson*, this Court unanimously held that states are required to provide a meaningful opportunity for taxpayers to obtain refunds of taxes found unconstitutional under the Commerce Clause. Similarly, *Harper* reversed a state supreme court's decision denying federal retirees refunds of taxes held invalid under the constitutional doctrine of intergovernmental tax immunity. In both cases, this Court held that limiting relief for taxes collected in violation of federal law to prospective remedies is not sufficient to meet federal requirements.

McKesson involved an unconstitutional excise tax on alcoholic beverages. The Florida Supreme Court found that state authorities had collected the tax in good faith

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[23] *Arizona v. California* involved an attempt to reopen a final judgment issued by this Court in an action within its original jurisdiction pursuant to a provision in the decree retaining jurisdiction to modify the decree. The situation here with regard to proceedings in the same case following the issuance of an unappealed final judgment is similar. *See* 460 U.S. at 617 n.7. *See also, Nevada v. United States*, 463 U.S. 110 (1983) (United States and Indian tribe held barred from reopening an unappealed final water rights decree by res judicata); *Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394 (1981) (litigants held barred from relitigating an unappealed final judgment even though the judgment was based on a principle subsequently overruled by the Supreme Court and similar actions were successfully appealed).

reliance on a presumptively valid statute. It also suggested that granting a refund probably would result in a windfall because of the likelihood that the cost of the tax had been passed on to third parties. 496 U.S. at 26.

This Court observed that the State had various ways of coping with the fiscal consequences of potentially unconstitutional taxes which it chose not to utilize. For example, the challenged taxes could have been paid into an escrow account. Moreover, there was substantial reason to doubt the validity of the liquor taxes. *Id.* at 45 & n.29, 50. These factors are applicable here as well. *See Crow IV*, 92 F.3d at 829 & n.3, Pet. App. 9.[24]

This Court also rejected Florida's argument that it should be allowed to keep the unlawful taxes because the taxes probably had been passed on to the taxpayer's customers and therefore would constitute a windfall. Even if that were true, a retroactive remedy would be appropriate in order to effectuate the underlying purpose of the Interstate Commerce Clause. 496 U.S. at 48.

The only difference between *McKesson* and the instant case is that the plaintiffs in *McKesson* were taxpayers. But contrary to petitioners' primary contention, this Court also has held that non-taxpayers may recover taxes collected in contravention of federal law. *Maryland v. Louisiana*, 451 U.S. 725 (1981). In that case, several states challenged the

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[24] This Court's treatment of Florida's equitable defenses in *McKesson* also is supported by its reasoning in *Owen v. City of Independence*, 445 U.S. 622 (1980), that substantial equities cut in favor of persons injured as a result of the illegal actions of a governmental entity. "[W]here the . . . government itself . . . is responsible for the constitutional deprivation[,] it is perfectly reasonable to distribute the loss to the public as a cost of the administration of government, rather than to let the entire burden fall on the injured individual." 445 U.S. at 655 n.39.

constitutionality of taxes imposed by Louisiana on certain uses of natural gas brought into the State from the outer continental shelf. The states sued for declaratory and injunctive relief as well as for refunds of the taxes already collected. This Court held that the states could seek recovery of taxes they did not pay in order to protect their citizens from substantial economic injuries resulting from Louisiana's unconstitutional tax. *Id.* at 739. Like *Maryland*, the instant case involves recovery of state taxes collected in violation of federal law by an entity that is an intended beneficiary of the broken law.

Maryland negates the existence of the *per se* rule urged by petitioners that would preclude the recovery of illegal taxes by non-taxpayers. Neither petitioners nor any of the amici states suggest that *Maryland* was wrongly decided or that *California* implicitly overruled, limited or qualified *Maryland's* holding that non-taxpayers may recover unlawfully collected taxes that conflict with federal policies and interests.

4. Montana and Big Horn County Should Not Be Allowed To Take Advantage of Their Own Wrongs.

The disgorgement remedy in favor of the Tribe ordered by the court below also will fulfill the "ultimate, fundamental and unquestioned" principle of equity that "no one shall be permitted to found any claim upon his own inequity or take advantage of his own wrong." *R. H. Stearns Co. v. United States*, 291 U.S. 54, 61-62 (1934); Mont. Code Ann. § 1-3-208 (codifying the principle that "no one can take advantage of his own wrong" as a "maxim of jurisprudence"); *Western Media, Inc. v. Merrick*, 232 Mont. 480, 757 P.2d 1308, 1312 (1988) (applying Mont. Code Ann. § 1-3-208).

This Court's decision in *Snepp v. United States*, 444 U.S. 507 (1980) (per curiam), applied this principle in a situation involving the fashioning of appropriate relief to remedy the violation of federal law. A former CIA agent wrote a book contrary to the covenant in his employment contract not to publish any material relating to the CIA without the agency's prior approval. This Court imposed a constructive trust on profits derived from sale of the book. Requiring the former agent "to disgorge the benefits of his faithlessness" served the dual purposes of preventing him from taking advantage of his wrong and of effectuating the federal policy that was violated. 444 U.S. at 514-16. The disgorgement remedy in favor of the Tribe fulfills these same purposes.

III. THERE ARE NO FACTORS THAT WOULD MAKE THE DISGORGEMENT REMEDY IN FAVOR OF THE TRIBE INAPPROPRIATE.

Only one question was presented in the petition for a writ of certiorari, whether taxes paid by one party, Westmoreland, may be recovered by another, the United States on the Tribe's behalf. Several extraneous issues are discussed in petitioners' brief, including such matters as the location of the Westmoreland mine within the ceded strip, the services provided by the State and County in the ceded strip, the Tax Injunction Act, the Secretary of the Interior's purported decision not to approve the Tribe's severance tax as applied to its ceded strip coal, the proper amount of any recovery, the balancing of equities, Montana's good or bad faith when its coal taxes were enacted, and claimed defects in pleadings. These issues were not raised in the petition nor are they fairly included within the question that was presented. Consequently, they "will not be considered by the Court." Sup. Ct. Rule 14.1(a); *Izumi Seimitsu Kogyu v. U.S. Phillips*, 510 U.S. 31 & n.5 (1993) ("a question

which is merely 'complementary' or 'related' to the question presented in the petition for certiorari is not 'fairly included therein' "; "the fact that the petitioner discussed this issue in the text of its petition for certiorari does not bring it before us"; "we will disregard Rule 14.1(a) and consider issues not raised in the petition 'only in the most exceptional cases' ").

A. This Case Is Not Affected By the Tax Injunction Act.

As previously noted (*supra* at 25), a federal court's remedial authority may be limited by Congress. Petitioners' reliance on the Tax Injunction Act, 28 U.S.C. § 1341, therefore could be considered in determining whether a remedy for the invasion of the Tribe's federally secured rights is appropriate if it was fairly included within the question presented in the petition. It was not.[25]

In any event, § 1341[26] was not argued below for good reason. In *Department of Employment v. United States*, 385

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[25] Section 1341 was not mentioned either in the question presented or in the entire petition. The statute is addressed to the jurisdiction of federal courts, not to whether a non-taxpayer may recover taxes paid by someone else.

Moreover, petitioners did not rely on or cite to § 1341 in either their Ninth Circuit brief or their petition for rehearing with suggestion for rehearing en banc to that Court. Accordingly, this argument should not now be considered by this Court. *Holly Farms Corp. v. NLRB*, 517 U.S. 392, ___ n.7, 116 S.Ct. 1396, 1402 n.7 (1996); *Oklahoma Tax Commission v. Chickasaw Nation*, 515 U.S. 450, 456-57 (1995).

[26] Section 1341 states:

> The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State.

U.S. 355 (1966), this Court held, "in accord with an unbroken line of authority and convincing evidence of legislative purpose, that § 1341 does not act as a restriction upon suits by the United States to protect itself and its instrumentalities from unconstitutional state exactions." *Id.* at 358, footnotes omitted. This holding was extended to suits by Indian tribes challenging the validity of state taxes in *Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463, 470-75 (1976). Hence, § 1341 is "inapplicable" to the instant action. *Id.* at 470.[27]

B. Remedies for the Violation of Federally Secured Rights Are Not Limited by the Elements of Common Law Causes of Action.

Contrary to petitioners' underlying premise, the relief federal courts may grant to remedy violations of federal law is not limited to or constrained by traditional common law causes of action. In *Wyandotte Transportation Co. v. United States*, 389 U.S. 191 (1967), for example, this Court upheld the right of the United States to impose liability on shipowners under the Rivers and Harbors Act

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[27] Furthermore, § 1341 applies only "where a plain, speedy and efficient remedy may be had in the courts of such State." There is no such remedy here because the applicable state law, Mont. Code Ann. § 15-1-402, requires "[t]he person upon whom a property tax or fee is being imposed" to pay the tax or fee under protest "in order to receive a refund." Montana's coal taxes were not imposed on the Tribe, so the Tribe could not have paid them under protest and therefore could not have brought an action for their recovery under state law. There is no remedy, no less one that is "plain and efficient," under Montana law for persons or entities in the Tribe's position to recover taxes paid by someone else. *See also*, Mont. Code Ann. § 15-1-406 (authorizing declaratory judgment actions challenging the validity of state taxes by "an aggrieved taxpayer").

of 1895 for the negligent sinking of their vessels because that remedy was necessary to fulfill the statutory purpose. "Denial of such a remedy . . . would permit the result, extraordinary in our jurisprudence, of a wrongdoer shifting responsibility for the consequences of his negligence onto his victim." 389 U.S. at 204. This Court specifically declined to decide whether the United States would have been entitled to that relief in the absence of the statute. 389 U.S. at 196 n.5.[28]

Petitioners have not cited a single case, and the Tribe is not aware of any, where an otherwise appropriate remedy for the violation of a federal law was withheld on the ground that the prerequisites for a common law cause of action were satisfied.[29] Indeed, absent an estoppel,

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[28] Here, equally extraordinarily, the wrongdoers are seeking to retain the profits obtained from their illegal acts by shifting attention to the stakeholder and away from the real victim.

[29] Petitioners cite four decisions of this Court to support their argument that the power of federal courts to grant appropriate relief to remedy violations of federal law is constrained by the elements of traditional common law causes of action, *Rondeau v. Mosinee Paper Corp.*, 422 U.S. 49 (1975); *Heck v. Humphrey*, 512 U.S. 447 (1994); *Deckert v. Independent Shares Corp.*, 311 U.S. 282 (1940); and *Lonchar v. Thomas*, 517 U.S. 314, 116 S.Ct. 1293 (1996), incorrectly cited by the petitioners as *"Lochner v. Thomas."* None of these cases remotely stands for that proposition.

Rondeau held no more than that a showing of irreparable harm was necessary for a private litigant to obtain injunctive relief for a violation of a federal securities statute. That common sense constraint on the use of a federal court's coercive powers is a far cry from a holding that those courts may not grant relief necessary to effectuate the purposes of the federal law unless all of the requirements of a traditional common law cause of action are satisfied. Indeed, this Court specifically noted that the

illegal conduct or a jurisdictional or procedural defense, this Court has never denied a remedy for the violation of a federally secured right which would correct the wrong done to the plaintiff and effectuate the purpose of the laws that were broken.

The instant case involves a cognizable cause of action brought pursuant to federal laws. Violations of these laws have been conclusively established. Consequently, the issue of appropriate relief is governed by the rules and criteria discussed in Part II *supra*, not on technical requirements of common law causes of action.

C. All of the Elements of the Assumpsit Common Law Cause of Action Are Satisfied.

Assuming *arguendo* that the common law action for assumpsit is relevant to fashioning an appropriate remedy, all of its requirements are satisfied. Assumpsit, an action for money had and received, requires: (i) a wrongful act; (ii) specific property acquired by the wrongdoer which is traceable to the wrongful behavior; and (iii) a reason why

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injunctive relief at issue in *Rondeau* was not needed to correct any of the evils the law at issue was intended to prevent. 422 U.S. at 58-59.

Petitioners' reliance on *Heck* and *Deckert* again reveals their confusion regarding the difference between a federal cause of action and the relief afforded under it.

The Tribe has no quarrel with the principle, recently restated in *Lonchar*, that "courts of equity must be governed by rules and precedents no less than the courts of law." 517 U.S. at ___, 116 S.Ct. at 1298, *citing, inter alia, Albemarle*. The relevant question is what body of rules and precedents applies to the fashioning of appropriate relief for the violation of federally secured rights, those discussed in Part II of this Brief and applied in *Albemarle* or the elements of common law causes of action as urged by petitioners.

reason why the party holding the property should not be allowed in good conscience to keep it. *Alsco-Harvard Fraud Litigation*, 523 F.Supp. 790, 806-07 (D.D.C. 1981) (and cases therein cited); *Schaeffer v. Miller*, 41 Mont. 417, 423, 109 P. 970, 973 (1910); Pet. App. 43, 70-71. If these elements are present, the law implies the existence of a contract to turn over the wrongfully acquired property to its rightful owner. *Midwest Aviation, Inc. v. General Electric Credit Corp.*, 907 F.2d 732, 736-37, 743-44 (7th Cir. 1990) ("[q]uasi-contractual duties arise only in situations of unjust enrichment, situations where 'one person has received money or its equivalent under such circumstances that in equity and good conscience he ought not to retain it and which *ex cequo et bono* belongs to another' ").

All three elements clearly are satisfied here. The wrongful acts are the imposition and collection of the invalid state coal taxes in violation of federal law. The wrongfully acquired property is the $58 million in illegally collected coal tax revenues. The reasons why Montana should not be allowed to keep that money and why it should be paid over to the Tribe are that it was acquired in violation of the Tribe's rights under federal law and that disgorgement would effectuate the purpose of those laws and make good the wrongs done to the Tribe during the periods the illegal taxes were collected.[30]

Nothing more is required. In its 1990 decision denying Montana's motion for summary judgment, the district

[30] Petitioners' description of the assumpsit cause of action includes the additional element of a benefit conferred by the plaintiff to the defendant. Pet. Br. 26. Assuming *arguendo* that a benefit conferred by the plaintiff is required, it is satisfied here, albeit involuntarily, by the value of the Tribe's coal which Montana unlawfully appropriated to itself.

court carefully considered and squarely rejected Montana's argument that restitutionary relief is precluded because the taxes were paid to Montana and Big Horn County by Westmoreland, not by the Tribe. Relying on case law from Montana as well as other jurisdictions[31], the district court concluded that the claim of the Tribe and the United States to the illegally collected taxes turns on the issue of unjust enrichment, not on the identity of the taxpayer. Pet. App. 79-81. Here, as in *Snepp*, the nexus between the wrongdoers and their victims necessary to establish a cause of action or to obtain appropriate relief is the violation of the victim's federally secured rights. That was also the precise holding of *Crow III*.

California is not to the contrary. It does not hold or even suggest that only taxpayers may recover taxes illegally imposed and collected by governmental entities. This Court pointed out in *California* that the federal government's contractor had challenged the state's taxes, had had its day in court, settled its claim and gone home. 507 U.S. at 752. The federal government's claim was proprietary in nature[32] and was derived from its contractor. Both the government and its contractor were provided a

[31] *Valley County v. Thomas*, 109 Mont. 345, 97 P.2d 345 (1939); *Humboldt Co. v. Lander Co.*, 56 P. 228 (Nev. 1899); *City of Norfolk v. Norfolk County*, 91 S.E. 820, 822-24 (Va. 1917); and *Board of Highway Comm'rs v. Bloomington*, 97 N.E. 280, 283-85 (Ill. 1912). These cases as well as *Maryland v. Louisiana* stand for the proposition that non-taxpayers may, under some circumstances, sue to recover taxes. They have been on the books since the turn of the century, without opening the floodgates of litigation or undermining the tax systems of state and local governments.

[32] Unlike the instant case, *California* did not involve any sovereign interest of the United States. *See supra* at 22 & n.15. This Court noted in *California* that different rules apply to the United States when it is acting as a sovereign. 507 U.S. at 757-58.

full and fair opportunity to challenge the validity of California's taxes under state law. 507 U.S. at 750, 756-57. The failure of the federal government to comply with state filing requirements barred its claim for a tax refund under state law. 507 U.S. at 756-57. Since an adequate remedy was available which the federal government had failed to utilize, it was not unjust for California to keep the money it collected from the contractor, just as a state would be able to retain taxes received from any other taxpayer who failed to follow procedures required to obtain a refund. When the federal government "challenge[s] a state tax on state-law grounds," it should not be treated any differently than other taxpayers "simply because it is the Government." 507 U.S. at 759-60, emphasis added.

This case is entirely different. The Tribe's claim is predicated on the unlawful appropriation and conversion of its mineral wealth and the violation of its federally secured rights, not on state law or a voluntary indemnification agreement. The Tribe and the United States do not have a plain and efficient remedy for recovery of the taxes at issue under state law. *See supra* at 41 n.27. There is no contention that the Tribe's rights have lapsed or that its claim is barred. Nor is there an attempt to circumvent a stale state claim by substituting a federal cause of action. Granting the relief sought by the Tribe and the United States would not result in unfair treatment vis-a-vis other taxpayers. In short, none of the factors which made it equitable for California to keep the taxes it collected from the federal government's contractor is present here.

IV. THE RAMIFICATIONS OF THIS CASE ARE LIKELY TO BE LIMITED AND AN AWARD TO THE TRIBE MAY BE SATISFIED WITHOUT SEVERE DISRUPTION OR UNDUE HARDSHIP.

A. This Case is Unique in Many Respects.

Contrary to the concerns expressed by the petitioners and their amici, the circumstances presented in this case are not likely to recur. First, as this Court observed in *Cotton Petroleum*, Montana's "extraordinarily high" coal taxes are "unique." 490 U.S. at 186 n.17. Second, the United States and the Tribe are co-plaintiffs, so there are no Eleventh Amendment or sovereign immunity issues[33] and section 1341 is not applicable. *See supra* at 25 n.19 and 40-41. Third, owing to the presence of the United States in its sovereign capacity and as the Tribe's trustee and the plenary power of the federal government over Indian affairs,[34] the solicitude for state taxation systems and fiscal interests is not as strong here as it would be in other contexts. Fourth, the claimant to the taxes illegally collected by the State and County is a separate sovereign entity that is not subject to state jurisdiction or control

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[33] This Court held in *Blatchford v. Native Village of Noatak*, 501 U.S. 775 (1991), that the Eleventh Amendment bars suits by Indian tribes against states without the states' consent. *Cf. Idaho v. Coeur d'Alene Tribe*, 117 S. Ct. 2028 (1997); *Seminole Tribe v. Florida*, 517 U.S. 44, 116 S. Ct. 1114 (1996) (suits by Indian tribes against states and state officials held barred by the Eleventh Amendment).

[34] *See Seminole Tribe*, 517 U.S. at ___, 116 S. Ct. at 1126 (states still exercise some authority over interstate trade but have been divested of virtually all authority over Indian Commerce and Indian tribes); *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 234 (1985) ("Indian Commerce Clause makes Indian relations the exclusive province of federal law").

and is the intended beneficiary of federal laws designed to promote its self-government and economic development. Fifth, from the very beginning Montana had actual notice of the Tribe's position that the proposed coal taxes would be invalid as applied to tribal coal and, as in *McKesson*, 496 U.S. at 50, "the State here does not and cannot claim that the . . . invalidation of the [its taxes as applied to Crow coal] was a surprise." Sixth, the state has sufficient money in its Constitutional Trust Fund to satisfy the judgment of the court of appeals. Seventh, the disgorgement remedy in favor of the Tribe is the only relief that would correct the wrongs done to the beneficiary and effectuate the purposes of the federal laws that were broken during the periods the State and County collected the illegal taxes. This combination of circumstances is likely to be extremely rare if not unique.

B. States Have the Ability to Shape and Limit Remedies for Recovery of Illegally Collected Taxes.

If and to the extent that non-taxpayers other than the United States and states may be able to overcome the sovereign immunity of the taxing states in order to recover taxes collected in violation of federal law, states would have flexibility to determine an appropriate remedy that satisfies the minimum requirements of federal law. As noted in *McKesson*, 496 U.S. at 50, "in the future, States may avail themselves of a variety of procedural protections against any disruptive effects of a tax scheme's invalidation. . . . " *See also, id.* at 36-41; *Harper*, 509 U.S. at 100-01. For example, non-taxpayers may be required to provide notice of their intent to recover taxes paid by someone else and their claims may be made

subject to statutes of limitations. 496 U.S. at 50. Consequently, the claims of the petitioners and their amici that the decision below will create havoc with the operation of their tax systems are greatly exaggerated, to say the least.

C. Montana's Constitutional Trust Fund Is Available to Satisfy an Award to the Tribe and Should Be Treated as the Functional Equivalent of an Escrow Account.

As previously noted (*supra* at 34-35), the district court's unarticulated bottom line was that the Tribe should not be allowed to recover any of the illegal taxes which were not paid into the court's registry. Although Montana did not formally establish a separate escrow account for the illegal taxes it collected from Westmoreland, its Constitutional Trust Fund (which had a book value of more than $500 million as of June 1993, Pet. App. 25; *supra* at 8) serves essentially the same purpose.

It is unseemly for Montana to seek to avoid restitutionary relief by invoking concern about the potential adverse consequences of a large judgment against which it was (and is) fully equipped to protect itself. *See McKesson*, 496 U.S. at 50 (the state "failed to take reasonable precautions to reduce its ultimate exposure for the unconstitutional tax").[35] Under these circumstances, the Constitutional Trust Fund should be viewed as an escrow account for the purpose of satisfying a judgment for the United States in trust for the Tribe under the venerable equitable principle that "equity regards as done that

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[35] The amount of money at issue in the instant case reflects the magnitude of the unjust enrichment unlawfully obtained by the State and County at the Tribe's expense and the extent of the injuries inflicted on the Tribe.

which ought to have been done." *Camp v. Boyd*, 229 U.S. 530, 559 (1912); *Littlefield v. Perry*, 88 U.S. (21 Wall.) 205, 226-27 (1875); Mont. Code Ann. § 1-3-220 (codifying as a maxim of jurisprudence: "that which ought to have been done is to be regarded as done. . . . "); *Matter of Adoption of S.T.V.*, 226 Mont. 18, 733 P.2d 841, 842 (1987) (applying Mont. Code Ann. § 1-3-220).

The existence of the Constitutional Trust Fund means that Montana would be able to make full restitution to the Tribe without severe disruption or undue hardship to its ongoing programs and operations. It also eliminates any conceivable basis for treating the taxes now at issue any differently than the escrowed funds previously awarded to the United States in trust for the Tribe.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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